UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS Plaintiff, VS. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al., Defendants.	)	CAUSE NO. 5:13-CV-255-C

MOTION FOR SUMMARY JUDGMENT HEARING
BEFORE THE HONORABLE SAM R. CUMMINGS,
SENIOR UNITED STATES DISTRICT JUDGE

TUESDAY, OCTOBER 17, 2017
LUBBOCK, TEXAS

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P R O C E E D I N G S

THE COURT: The Court calls for hearing Cause Number CV5-13-255. This case is styled State of Texas, Plaintiff, vs. Equal Employment Opportunity Commission; Victoria A. Lipnic, in her Official Capacity as Acting Chair of the EEOC; and Jefferson B. Sessions, III, in his Official Capacity as Attorney General of the United States, Defendants.

Who is here on behalf of the plaintiff?

MR. NIMOCKS: Good morning, Your Honor. Austin Nimocks on behalf of Texas, joined by my colleague Andrew Leonie.

MR. LEONIE: Good morning, Your Honor.

THE COURT: Good morning.

All right. Who is here on behalf of the defendants?

MR. POWERS: Good morning, Your Honor. Jim Powers on behalf of the United States.

THE COURT: All right.

Okay. This morning, the Court will entertain argument from each side concerning your respective motions for summary judgment. I've given each side up to 90 minutes to present your position.

Plaintiff, you may begin.

MR. NIMOCKS: Thank you, Your Honor. Good morning and may it please the Court.

The case before you is a case about authority. And the primary question this case asks, Your Honor, is whether Title VII prohibits the Texas legislature from adopting categorical hiring prohibitions for felons.

As we've demonstrated in our briefing, there are over 300 places in Texas law where a felonious history automatically impacts an individual's access to societal privileges, and that includes employment. Of course, those restrictions go well beyond employment, Your Honor. These laws apply without exception in Texas, leaving no discretion to be exercised by those charged with implementing the law.

The guidance, or rule as we call it, at issue in this case takes a very hard-line stance against these categorical prohibitions, finding and suggesting in other places that these categorical prohibitions in Texas law, and other places where they may be found, create a per se, unlawful disparate impact under Title VII or do not survive Title VII scrutiny.

The rule at issue demands that where felons apply for jobs in Texas for which they are categorically excluded, Texas must nonetheless engage in EEOC's three-part individualized assessment protocol, a protocol that exists nowhere in Title VII. So even though the felon is completely unqualified for the position at issue, Texas need not--cannot stop there. We must continue to expend taxpayer resources

going through a useless exercise of listening to why the felon nonetheless should be given the position in question.

This is, of course, troublesome for Texas, because the Supreme Court and the Fifth Circuit have been clear that legislative enactments of the legislature are presumed valid. And that's made clear in the Cleburne case from the Supreme Court in 1985, the Burlington Northern case from the Fifth Circuit in 2005, both of which we cite in our response brief, Your Honor.

Because these legislative enactments of Texas are presumed valid, we believe that any Texas law that disparately impacts a protected class is presumed, as a matter of law, to be valid or survive Title VII scrutiny, at least the initial stages. In the Title VII context, to be more specific, Your Honor, this means that the Texas laws are presumed job-related for the position in question and consistent with business necessity or public interest, is the standard when it comes to a sovereign, as the Supreme Court has made clear.

The Supreme Court has been clear that the touchstone for the question is business necessity. EEOC, in this rule at issue before Your Honor, does not consider the business necessity or the public interest of Texas or any other sovereign in issuing the rule. Indeed, EEOC makes it clear that the rule extends to sovereigns and municipalities but does not at one point in time in the rule consider the special

circumstances that a sovereign like Texas have. Texas, of course, is not engaged in the normal business process of hiring individuals to make widgets. We're a sovereign. We have a greater interest at stake, and the laws that we have form a greater tapestry or legal framework, each one impacting the other.

This explains why Texas is entitled to special solicitude before this Court as it pertains to our standing, but also our substantive interest in this Title VII analysis. Because the public interest dynamic of Texas is lost upon the EEOC and its rule, or really more accurately fully ignored by the EEOC, there's a significant substantive conflict with the rule and Texas law and policy. The rule thusfore questions the propriety of Texas's longstanding interdependent laws, laws that predate not only Title VII, but EEOC itself. These laws are the product of over 85 legislatures, over 180 years of sovereignty, and are deeply embedded and rooted in Texas history.

You can see the problems at issue here, Your Honor, when the rule was applied against Texas law. And let me give you some examples. Texas law, as we made clear in our briefing, specifically forbids felons from being hired as peace officers. In other words, felons are not allowed to carry guns and be charged with the responsibility of securing the peace of the citizenry. We have similar restrictions in Texas law

regarding being a schoolteacher, taking care of elderly or vulnerable Texans, and other significant positions of public trust or where the public trust is significant.

Yet this rule demands that, even in those instances, we must nonetheless engage in conducting individualized assessments, that we must explore the history of a felon to determine whether they might, in some respect, qualify to actually be a good peace officer or a game warden or an elderly caretaker for the Department of Aging and Disability Services.

The Department of Justice ups the game, Your Honor, in the briefing before this Court. Not once does the Department of Justice disavow the individualized assessment standard that EEOC promulgates in the rule, or even concede that there are certain positions of public trust in Texas law that justify taking a no-risk proposition with regard to felons. And we believe some of these propositions are very easy, to the point of self-evident to anybody.

This is concerning, because the problem is, is that the rule says that categorical prohibitions like those in Texas law are per se unlawful, that we've got to conduct these individualized assessments and we can never say that a felon is per se excluded from employment opportunities.

This creates a conflict, because other areas of Texas law that don't involve employment make clear and have

been upheld multiple times by courts that there are certain societal privileges that felons do not qualify for: the privilege of serving on juries; the privilege of holding public office in places of significant public trust; and, of course, the privilege of voting, which can only be restored under certain circumstances.

Your Honor, the Department of Justice declares the rule at issue as, quote, "eminently reasonable," unquote, and, quote, "fairly encompassed by Title VII," unquote, in its briefing. This is concerning, because, as the Department of Justice makes clear, it holds the key to being able to prosecute Texas for any prospective violations under Title VII.

And, of course, Your Honor, this conflict that Texas is concerned about is not just theory. As our briefing makes clear and I know the Court is aware, because of this rule, a felon filed a complaint for not being given a job with the Department of Public Safety. This is a job where this felon would have access to a database containing the personal intimate information for over 29 million Texans.

The Texas Department of Public Safety has a no-risk policy regarding the safety and security of Texans and those that it will employ. The Department of Public Safety will not risk the safety and security and privacy of Texans, period, on an individual that has a problem in their past, like a felony conviction. And as the Fifth Circuit has recognized, felony

convictions are serious, because they represent egregious violations of the public trust.

Your Honor, there is no debate, nor there should be, that individuals with felony histories should not be employed at the Texas Department of Public Safety with access to that type of information, or even in a position carrying a firearm. And yet, because of the rule, this applicant believed that he was entitled to that job. For the first time that we are aware of, Your Honor, in Texas, a felon demanded to be employed with the Department of Public Safety, bolstered by the rule. And the fact that the rule bolstered this individual's belief or entitlement goes directly into questions regarding the APA cause of action, which I'll get to in a moment.

According to this rule, Texas violated Title VII by not wasting taxpayer resources to conduct an individualized assessment of this felon. According to this rule, Your Honor, notwithstanding the fact that this man was a felon and did not qualify for the position, we nonetheless needed to solicit information from him so he could explain the circumstances of his felony conviction and make a case as to why he was entitled to be employed at the Department of Public Safety. This cannot be correct on how Texas must use taxpayer resources, especially for positions of significant public trust.

The rule's demand for individualized assessments, Your Honor, is not something that occurred overnight. The

defendants formulated this new rule, as we believe we demonstrate in our briefing, through a series of snowballing decisions, policy statements that did not go through notice and comment, Your Honor. The EEOC titles these things as guidances and statements, but the pragmatic and common-sense approach required by the controlling case law requires us to look at the essence of those documents and how they are treated by the defendants and the impact that they have on everybody involved.

With ruling after ruling and guidance after guidance, the EEOC systematically pushed the business necessity requirement from the analysis, instead replacing it by its preferred three-part test. And as business necessity was marginalized, the EEOC's individualized assessment mandate became more and more prominent in the things that it was releasing, and now it has a prominent place, and I would say an exclusive place, in the new rule.

Your Honor, I want to get more specific now and turn to some of the issues that--some of the threshold issues that have been raised in the briefing on this. I know that this Court has ruled on the question of standing, at least in the motion to dismiss. This has been discussed by the Fifth Circuit in the prior case. And I recognize that the Fifth Circuit opinion was vacated, so when I reference that, I want the Court to understand that I recognize I'm referencing a vacated case, but nonetheless, as this Court found it

instructive, so do we in many respects.

I think the standing analysis that this Court has to conduct, if it feels compelled to do it in a more thorough sense, is relatively simple. First and foremost, as made clear by the Supreme Court in Massachusetts against EPA, Texas stands before this Court with a special solicitude. We are not the average plaintiff. We are not the average party. The depth and breadth of our concerns and circumstances that we have--and here, that's demonstrated especially with the over-300 places in Texas law where having a felonious history impacts your ability to access sole societal privileges. This is all at stake and at issue before the Court, and Texas has an interest in protecting it all.

Texas also stands here in a capacity as parens patriae. Why is that? Well, Texas has an interest to bring forth a case as parens patriae when it's acting to protect the health, welfare, and safety of its citizens. Oftentimes this can be in the capacity of an actual physical threat, but also the Supreme Court has made clear that this applies when the threat can be economic. And that's from the Alfred Snapp case, 1982, which I'm fairly certain we do cite, although I don't have the page number, Your Honor. That's at 458 U.S. 592.

And so the interests are not just physical interests we're protecting of the Texas citizenry, but economic interests. And as a matter of fact, in this day and age, Your

Honor, I would argue that felons with nonviolent histories may be more dangerous to society than felons with violent histories, simply because of the electronic age in which we live, the propensity for identify theft. And so Texas has to consider on an equal basis not just violent felonies, but nonviolent felonies, felonies that have to do with fraud, felonies that have to do with deceit and represent general propensity of an individual to be dishonest or not respect the rights, not only of Texas, but their fellow citizens.

A helpful indication, says the Supreme Court, of parens patriae standing, which we do plead in our complaint, Your Honor, is whether the injury is one that the State would likely attempt to address through its sovereign lawmaking powers. This is why the over-300 places in Texas law where a felonious history exists or impact an individual matter so much, because Texas has been addressing what it means to be a felon for a very long time, across every aspect of society. And as we demonstrate in our briefing, the places where Texas law addresses the consequences of being a felon affect virtually every aspect of Texas law and society. You would be hard-pressed to not find an area of Texas law where having that history doesn't matter.

So in addition to our special solicitude and our presence here as parens patriae, as the Fifth Circuit has made clear, we are an object of the rule at issue. This is a

relatively simple proposition, because the rule itself says so. This is on page 6 of our appendix, page 3 of the rule, where the guidance expressly states that it applies to state and local governments. So we are an object of this rule notwithstanding--because EEOC says so, notwithstanding the fact that EEOC neglected to consider the special circumstances of state and local governments with regard to the rule. And the EEOC has previously, in this case, conceded that we are an object of the rule. The Fifth Circuit recognized that in its opinion at Note 3.

And I would say this, Your Honor, with regard to the Fifth Circuit's opinion. I realize that it has been vacated, but I don't know that the Fifth Circuit vacating that opinion necessarily vacates the underlying facts or, especially, concessions that were made that I think really fall into the law of the case doctrine in some respect, or facts that are still part of this dispute. So I think, from a factual standpoint, this Court could reasonably extract necessary facts that are still part of the record, acknowledged by the Fifth Circuit in their opinion, without necessarily disrespecting the fact that the opinion was vacated. And so I think there are some valid underlying facts that are in the record that the Court can acknowledge, especially some of the concessions made by the government during the course of the litigation.

In addition, from a standing standpoint, we have standing beyond being an object of the regulation, because the guidance does impose a mandatory scheme. And this is discussed by the Fifth Circuit in terms of the increased regulatory burden that Texas is facing with regard to the rule.

Now, the government makes an argument that because Texas has not fully incurred the increased regulatory burden, somehow we don't have standing. We don't have an injury in fact. But, Your Honor, that is not the standard. We do not have to go shoot ourselves in the foot or self-inflict an injury in order to come to court. As a matter of fact, self-inflicting an injury would run contrary to Supreme Court precedent, and I think about cases like Clapper against Amnesty International off the top of my head where it specifically says that you can't create your own injury.

Now, the standard is whether we are being pressured, and the Fifth Circuit talked about this. Is the existence of pressure enough? And, of course, it is. And we don't have to go beyond pressure. We don't have to incur the harm of going back inside of our agencies and reevaluating our hiring processes or having, more significantly, the governor call a special session and demand that the legislature conform the statutes at issue with the rule so we can avoid that. We don't have to do that to then come to court and say we have a problem. No, the existence of the pressure or the legal

conundrum that the rule faces is enough.

And the Fifth Circuit talked about this in the EEOC opinion, looking at specifically the DAPA, D-A-P-A, or Deferred Action case that the Fifth Circuit had. We did not--"we" being Texas--in the face of that particular presidential proclamation, go back and start reforming our rules or anything. What we recognize is that this proclamation is valid. Texas is going to have to start expending money with regard to driver's licenses and other things. And seeing that harm on the horizon was reflective of the pressure circumstance that was inflicted and more than enough for us to have standing and walk into court.

And that's not the only example. There are several examples of pressure. You, yourself, Your Honor, in the Persuader Rule case last year--even though the rule at issue was not yet in effect--the effective date was not there--we could see the harm forthcoming. We could see that this rule was going to impact Texas's sovereignty, and we had standing, and this Court had jurisdiction in order to grant the relief requested.

There was a similar circumstance last year with Judge Mazzant in the Eastern District of Texas regarding a rule from the Department of Labor. Again, the rule was not into effect yet. It was a preenforcement challenge. But again, the pressure of the rule being promulgated and the forthcoming

effective date of the rule was the pressure that we needed to have standing to be able to walk into court.

Now, to be fair, the last two cases I discussed, the Persuader Rule case and the case from the Eastern District from Judge Mazzant-- And by the way, Your Honor, we cite those cases, if you want to look at them more deeply, on page 16 of our opening brief. That's Docket Number 95 at page 16 in Footnote 28 where we cite those cases.

One of the cases in-- So let me back up. To be fair, those two cases that I just mentioned are cases where you have a formally promulgated rule that has a certain effective date, and so you see this effective date getting closer and closer with each passing day on the calendar. Well, what about a circumstance here where you don't have a formally promulgated rule? There is no necessary effective date, and so can you really see the harm on the horizon? And that's one of the questions that DOJ poses in their briefing.

And I think we can, Your Honor. And this was dealt with by Judge O'Connor in a case that we filed against the Department of Education--and this is a case that's also cited in Footnote 28--regarding a guidance document that was issued by the Department of Education. So we have kind of a similar circumstance here, a nonformally promulgated rule that has a legal consequence.

And in that case, Judge O'Connor found that we have

standing, because the guidance document was binding employees of the Department of Education, because they were out in the field enforcing the promulgation of the guidance document. And in that instance in particular, there had been actually a lawsuit brought against the State of North Carolina, and so a sovereign that had been--like Texas, that had schools and had interests at stake here.

As we demonstrate in our briefing, Your Honor--and I know that the Court--I think we even mention this in our complaint. That lawsuits have been filed against employers with regard to the rule is not in dispute here. It has been. It has been enforced. The fact that the Department of Justice has not filed one really doesn't matter. I mean, that's--I think that's an apples and oranges proposition, quite frankly, Your Honor. This rule is being viewed seriously by EEO staff, and lawsuits have been filed in federal court over this rule. So you have nonetheless, even with a guidance document, enforcement mechanisms happening. You have this foreseeable harm going on.

It has been almost, today, Your Honor, four years since this lawsuit was filed. But it's important, in looking at standing--and these are cases that we cite--that it is to be determined at the time the lawsuit was filed, on November 4th, 2013. And so in looking at the standing analysis, we have to go back four years and look at what's happening. And, of

course, there are cases from the Supreme Court and the Fifth Circuit which we cite on pages--on our response brief, which is Docket Number 101, at pages 7 and 9 and 10. I'm looking at the Davis against FEC case from the Supreme Court, Lujan against Defenders of Wildlife, Pederson against Louisiana State University, the 2000 Fifth Circuit case. All of those cases, and more, support the proposition that we look at standing at the time the lawsuit is filed.

So what is happening at the time the lawsuit is filed? And in addition, one case I don't know that I did cite in our brief, Your Honor--actually, I think I did, on page 8 of Docket Number 101, but I think it's significant here, is the Toilet Goods case from the Supreme Court in 1967. And in that case, the Supreme Court found standing where the impact was felt by those subject to the rule at issue in conducting their day-to-day affairs.

Why is that important? Because we filed this lawsuit on November 4th, 2013. Three days later--three days earlier, on November 1st, Texas was notified that we had been charged with discrimination under Title VII for not hiring a felon, and this is the felon issue with DPS that I have alluded to earlier. It cannot be disputed that, at that moment, we were feeling the impact of the rule. The fate of that complaint was unknown. It was uncertain. But we certainly were feeling the impact of the rule, by any reasonable

standard, at that moment, Your Honor.

And we have to look at-- Well, let me transition here, Your Honor. From a standing standpoint, I think I've articulated that we have injury in fact. And so the question is, do we have a right to walk into court from that injury? We filed a lawsuit with two causes of action: a declaratory judgment cause of action, which is Count I, and an APA cause of action, which is Count II. And the Department of Justice goes to great lengths to try to demonstrate in the briefing that we are not entitled to walk into court on either one. So I'm going to take those in order here, Your Honor, and address first and foremost the declaratory judgment cause of action, Count I.

When we're looking at whether a declaratory judgment cause of action is appropriate, obviously there's no precise test, as the case law makes clear from both the Supreme Court and the Fifth Circuit. I'm referring to the Maryland Casualty case from the Supreme Court in 1941, the Roark, R-o-a-r-k, case of the Fifth Circuit in 2008, both of which are cited in our response brief where the Supreme Court and the Fifth Circuit made clear, is we have to look at the facts alleged under all the circumstances, whether there is a substantial controversy between the parties at the time the lawsuit is filed.

Declaratory judgments are, of course, appropriate

where the questions before the Court are legal ones. And we don't really have any disputed facts here, Your Honor. This is, of course, a legal dispute regarding the per se validity of Texas's categorical hiring bans. Declaratory judgments are appropriate where there is actual present harm, Your Honor, or a significant possibility of future harm, again, at the time the lawsuit was filed, three days after this rule--or the consequences of this rule turned into a realistic complaint.

And so we didn't talk about this in our opening brief, Your Honor, but in our response brief, which is Docket Number 101, and I would direct the Court to page 12. We talk about the appropriateness of a declaratory judgment action as a cause of action in this case. And there are four Fifth Circuit cases that we cite to on page 12 there: the Sherwin Williams case from 2003, the St. Paul case from 1994, the Travelers case from 1993, and the Collin County case from 1990, which the Department of Justice also cites in its briefing.

Those cases are significant, because what those cases tell the Court is that, looking at the declaratory judgment context, the Court needs to flip the V. In other words, it has to ask, if the defendants were on the top side and Texas is on the bottom side, would Defendants be able to sue Texas, or, in this context, would the Department of Justice be able to sue Texas?

And, of course, we say that they would be able to.

Not only does the Department of Justice possess the power and the authority to enforce Title VII against Texas, but the Department of Justice has indicated significant substantive agreement with the rule, has not disavowed the rule, and won't even disavow the rule's application to even the factual circumstances presented with regard to the DPS complaint, Texas's laws regarding police officers, or anything else around--surrounding some of the specific facts and jobs that we have put into issue.

Texas is also entitled to bring a declaratory judgment action and it is appropriate when Texas is trying to avoid a multiplicity of lawsuits. So looking through the lens of Texas, Your Honor-- And the multiplicity concern is extolled in the Travelers case I mentioned at page 12. On November 4th, 2013, when we filed this lawsuit, the abstract concerns, if you would even call them those--I don't think they're abstract, but the Department of Justice calls them abstract--of the rule became reality with this complaint filed against Texas.

The lens through which we're looking is that we employ over 300,000 people in over 175 state agencies. We've got categorical bans regarding felons throughout Texas law in different agency policies. This is the tip of the iceberg.

We're also looking at, as we're looking through this lens, of the depth and breadth of Texas as an employer and

the risk that has now been foisted upon us, the rule's condemnation of our categorical hiring bans, this complaint that has now been filed against us. We're looking at what the Attorney General--at the time, General Holder--did in sending out a letter to every State Attorney General questioning the propriety of state law restrictions regarding felons, a letter that only acknowledges that when it comes to gun possession do we have a legitimate public safety issue. And we cite to that in our response brief, Your Honor. That letter from General Holder is not in the appendix, but we do provide a link to it.

At the time this lawsuit was filed on November 4, 2013, this is an era where there is a lot of litigation between Texas and the federal government, a lot of litigation between the Department of Justice, a lot of litigation that Texas is winning, Your Honor, where the federal government is continuing on a regular basis to overreach and invade Texas's sovereignty. And so you have this history of antagonism, if you will, Your Honor, going on in that context.

So what do all these things together mean, Your Honor? We've got a prospective multiplicity of lawsuits. We've got a realistic complaint now based on the rule. We have this history of antagonism. We have the Attorney General of the United States calling into question the validity of things. Can Texas at that moment say that there is a reasonable or imminent threat of litigation at that moment? Of course we

can. And we don't have to have been right.

And the fact that there hasn't been litigation, Your Honor, doesn't matter and, I think, is quite suspect. Obviously we believe that our lawsuit chilled any effort or intent by the federal government to come after us. I think it's completely discountable that the EEOC determined to issue a right-to-sue letter to the gentleman who filed a complaint saying it didn't find a reasonable basis. It's completely discountable that the Department of Justice has not filed a lawsuit just because we beat them to the courthouse and filed first and chilled whatever was being cooked up at the federal levels.

But the question is, Your Honor, could we be here today arguing about the exact same thing if the Department of Justice had filed this lawsuit against us? Of course we would. Of course we would. So when you look at the Fifth Circuit precedent and you flip the V, could the Department of Justice have brought us all here today? Of course they could have.

And so in that context, we have a very valid declaratory judgment act. This is an appropriate use of the Declaratory Judgment Act, looking at all the circumstances, our interest in avoiding a multiplicity of suits, and everything else along those lines. And so we have a valid threat of litigation, and so I think we have a very sustainable, Your Honor, cause of action under the Declaratory Judgment Act for

those reasons.

This brings us to Count II of our second amended complaint, which is the APA cause of action. As the Court is aware, we look at this cause of action through a flexible and pragmatic approach. There is no hard rule. And the two primary considerations at issue, whether the rule at issue marks the consummation of the decision-making process-- That's not in dispute, Your Honor, I don't believe. The Fifth Circuit didn't think it was in dispute, and there has been no argument, to my knowledge, that the rule does not represent that. So that prong is easily met.

The second prong is whether the action is one by which rights or obligations have been determined or from which legal consequences flow. The Department of Justice has focused a lot on the lack of an enforcement action in this case. But the Fifth Circuit vacated and remanded because of the Hawkes case, Your Honor, as you're aware. And the Supreme Court, in Hawkes, makes very clear--and I quote from page 1815--"Parties need not await enforcement proceedings before challenging final agency action where the proceedings carry the risk of serious criminal and civil penalties," unquote.

Obviously the risk of civil penalties contextually is the Title VII liability that awaits Texas for not engaging in individualized assessments or for maintaining its categorical hiring bans.

So I believe that we have the conundrum presented in Hawkes. We can stay the course with Texas law and risk being wrong after the fact, or we can go through the sausage making of changing Texas law and agency policy in order to bring ourselves within the safe harbors articulated by the rule. That's the pressure that we're feeling. Obviously that's the risk afoot, and those are the legal consequences that the rule provides to Texas. As the Hawkes court recognized, in that instance, the landowner could discharge without a permit and it was incurring a risk. Texas can stay the course with our current laws and we are incurring a risk, and, as I mentioned, the depth and breadth of who we employ.

So this is not just a proposition of one position or one agency or a handful of things. We're talking about over 300,000 employees, over 175 agencies. The risk is significant to Texas. As a matter of fact, I would almost argue that there is some element of inevitability given the footprint that Texas, as an employer, has. We are the largest employer inside of Texas by far, and so we necessarily have a huge risk, because we are the proverbial landowner in Hawkes, and so carrying on is a risk.

Now, in Hawkes, the Supreme Court addressed the question, well, why not wait? Why not wait for an unfavorable decision? And in this--the corollary in this case says, Texas, why not wait for an actual case to be filed? The analysis in

Hawkes, the Supreme Court said, was that seeking review of an unfavorable decision in that case, a permitting decision, an unfavorable permitting decision, was long and very expensive. It just wasn't a practical option. It didn't work. And so the landowner would have to consume years and I think the estimates were over six figures' worth of expense in pursuing the review. So this was not a really viable option. It wasn't just a simple quid pro quo and due process.

Your Honor, I think Texas has a very similar corollary here. Waiting for a case to be filed is not a reasonable option for us, because a single case over a single job inside a single agency doesn't really answer the larger macro question that we need answered. We could win a particular case. We could win the DPS case, for example. But that doesn't give us relief on all of the other absolute categorical bars that we have. It could become persuasive precedent if we win. But if we have to go through every single categorical hiring ban and litigate every single one of those things over however many years at whatever amount of taxpayer expense would be incurred to that end, we're looking at the same long, expensive process that the landowner was looking at in Hawkes, and that's just not a viable option. If the question was more narrow to a particular job or circumstance, maybe, maybe it's possible. But that's just not the case here. And so we are faced, like the landowner in Hawkes, with, the

remedy that's being suggested for us doesn't really work on a macro level.

And this is especially so, Your Honor, if Texas law is entitled to a presumption of validity, because if the categorical prohibitions enacted by the Texas legislature are presumptively valid and they presumptively are job-related for the position in question and consistent with business necessity, to use the standard from Title VII, then a single case does not answer the larger question of whether the other laws' categorical prohibitions, in fact, meet with the standard of Title VII.

The Court also has subject matter jurisdiction under the Administrative Procedure Act because, like the Hawkes case, Title VII does not have a stand-alone jurisdictional determinator. So in Hawkes, the Supreme Court was analyzing whether the APA was an appropriate remedial route for a problem with the Clean Water Act, and the Clean Water Act didn't have a jurisdictional marker, so to speak, in it or a separate dynamic where remedy could be pursued. And so because the CWA was devoid of such an indicator, the APA had to be the appropriate route for the landowner to get relief.

We have a very similar dynamic here, Your Honor. There is no stand-alone jurisdictional determination in Title VII that exists. And so the APA is, in that regard, an appropriate route for Texas, looking at the APA cause of

action.

I would also say that the APA question is--or, excuse me, the APA is a proper cause of action when you look at the fact that this rule has legal consequences, Your Honor, at a minimum, as the Fifth Circuit acknowledged, in binding EEOC employees, and yet, the EEOC does not possess substantive rulemaking authority. There is a paradox with what this rule does, and it's coming right out in the very front of it and saying, this applies to every employer regulated and controlled by Title VII and, yet, the suggestion that, well, this really isn't a substantive or a legislative rule. What other remedy would there be for a regulated entity to challenge the substantive impact of a rule from an agency that's not supposed to be issuing rules that have a substantive impact? It must be the APA, and that is a legal consequence that flows from the rule.

And so the second prong of the APA query that rights or obligations are being determined or that legal consequences flow is, of course, significant.

And finally, Your Honor, on this APA question, one of the things that was significant-- Well, let me back up just a little bit and go through all of the legal consequences that we believe flow in the--and what the Court has before it that satisfy the second prong of the APA analysis.

First, as I mentioned--and this Court mentions it

in your opinion, Your Honor. The Fifth Circuit talks about these two things, that the rule binds employees of the EEOC, and it has articulated safe harbor provisions. So those are legal consequences. It shows where you're safe and, therefore, where you're not safe, and it binds the employees.

But there are several other legal consequences that flow from this rule. First and foremost, we believe the rule preempts, in fact, Texas law by clashing with Texas categorical bans. And we talk about that in both of our briefs, most recently our response brief, Docket 101, at pages 3 and 4.

And the Fifth Circuit didn't dive into the factual analysis of the preemption question, but it acknowledged that we have that concern. But it didn't have to go that far in the opinion at the time in order to conclude that we had a sustainable cause of action. But that clash, we think, is very real and significant.

Now, it's not just the clash with Texas's categorical prohibitions. Because the rule clashes with Texas's categorical prohibitions, the rule also clashes with Texas's larger sovereign scheme. And what it does is, we believe, attacks a foundation of a larger thing, and when you attack the foundation of a building, the building becomes unstable. It cannot be, Your Honor, the case in Texas law that where the policy interests are the same, felons get treated differently.

So one of the examples that we use in our brief is the Texas law that says that a felon cannot be the administrator of an estate. Why is that? Well, as I think it was the Texarkana Court of Appeals articulated, because the administrator is in charge of other people's money. They have a duty to fulfill to the Court, and we just can't trust a felon with that responsibility.

And yet under the rule, Your Honor, a felon should be able to qualify for a job with the Texas Lottery Commission, managing billions of taxpayer dollars and the sensitivity overseeing the integrity that must accompany any lottery system that exists. There is an inherent conflict there, Your Honor. There's a conflict when Texas has certain-- The public trust in certain positions is dramatic, and we can protect that public trust in a nonemployment circumstance, but we can't protect it in an employment circumstance because of Title VII.

And so the conflict is not just as simple as the peace officer prohibition and the rule. It's a bigger thing. This is attacking the tapestry of Texas law regarding felons, because it would produce inconsistent results in Texas law. It just can't be that a felon is entitled to be a peace officer and carry a gun but, yet, can't serve on a jury. It doesn't make any sense in that regard. And so we think that there's a micro conflict with Texas law and then a more specific--or general, I say, macro conflict.

Now, another way that there is a legal consequence--and we're talking about the second prong of the APA cause of action--is that this rule increased the field of potential plaintiffs and Texas's footprint of potential liability. This is not something that was in my briefing, Your Honor, so I'm throwing something new at you, but bear with me.

This is something that was discussed in the Hawkes opinion by the Supreme Court, and I'm looking at page 1814, when the Supreme Court specifically talked about the legal consequence of a negative jurisdictional determination in that case. And a negative jurisdictional determination held the federal government at bay for five years and limited the potential liability of that particular landowner. And so by decreasing the field of liability, the Supreme Court said, the JD, or jurisdictional determination, had a legal consequence.

Well, we have a similar circumstance here, Your Honor, because this rule now for the first time takes direct aim at categorical hiring prohibitions. And because of the complaint that was filed against the Department of Public Safety, Texas knows that the public is taking this rule seriously. The field of potential plaintiffs now that may file Title VII complaints against Texas has grown, because now every felon has a right to say under the rule, you Texas, you Texas agency, you school district, you City of Lubbock, did not give me my individualized assessment. Even though you have your

categorical prohibition, the rule requires that we talk about this. The rule requires that you expend time and effort to determine whether I'm really required to undergo--or, excuse me--are entitled for this job.

And so the complaint against the Department of Public Safety stands for multiple propositions in this case, but it shows the increase of the field of potential plaintiffs that are now coming against Texas because of this rule, and there's a parallel there with the Hawkes case.

And then in the Hawkes case lastly, Your Honor, the legal consequence is that the rule at issue here warns of risk, and the mere warning of risk is a legal consequence. In the Hawkes case, the Supreme Court discussed the Frozen Foods case from 1956, and in that case, the Interstate Commerce Commission issued a piece of--I'll call it regulatory dark matter, because that's really what it was. That's very much like the guidance here. It wasn't a formally promulgated rule, and it just told everybody what the Interstate Commerce Commission thought may or may not be the case.

But the Supreme Court latched onto that in Hawkes and said, just because it was telling you what the Interstate Commerce Commission thought may or may not be the case, that's a warning. That's slapping something up against the wall for everybody to see. And then just issuing a warning is a legal consequence that satisfies the second prong of the APA

analysis.

So we clearly believe that we satisfy not just standing, but also the question of subject matter jurisdiction that the Department of Justice brings forth challenging our causes of action, that we're rightfully before the Court on the declaratory judgment action looking at the landscape as it existed when we filed; and that also, under the APA, there are clearly legal consequences, not just the ones the Fifth Circuit and this Court have previously recognized, but several more that flow from this rule that make the APA analysis ripe.

And lastly as to both, Your Honor, the declaratory judgment action and the APA cause of action, Texas does demonstrate with evidence the existence of an actual regulatory burden. We actually have expended effort with regard to this rule.

And the clearest piece of evidence of that is the Department of Public Safety's interaction with EEOC. When we got served with that complaint--and as made clear in the record, I think this starts on page 89 of our appendix--the Department of Public Safety had to go into the trench and look at what had been alleged, assess the rule, and develop and explain to the EEOC why the felon hiring ban was necessary. And we provided the EEOC a long letter--I think it's a two- or three-page letter--copies of internal memos and policies. That's an increased regulatory burden in fact. We had to do

that because of the rule.

And so even if some expenditure of Texas resources was required and we weren't entitled to take--press the Pause button on State spending money because we see the harm forthcoming, we did expend resources having to deal with this complaint that came forth based on nothing else than the fact that he was told that he was rejected because he was a felon, and for no other reason.

Now, Your Honor, having addressed some of the threshold questions of standing and subject matter jurisdiction, I'm going to now move to the merits, and specifically, I want to look at whether this rule complies with the Administrative Procedure Act, specifically the notice and comment requirement.

EEOC or the defendants claim that notice and comment is not required because it's an interpretive rule. But things that do not go through formal rulemaking process are nonetheless capable of being declared substantive rules for which notice and comment was required because of the substance or nature of the rule or guidance at issue.

And the first thing that the Court has to look at is whether the rule grants rights or imposes obligations. And this is from the Chrysler against Brown case from the Supreme Court in 1979 at 441 U.S. 281. As we have just demonstrated, I believe, Your Honor, there are legal consequences that flow

from the guidance at issue, and so that's the first step in determining whether this is really a legislative rule or an interpretive rule.

Secondly, one of the things the courts look at, and particularly the Fifth Circuit, is whether the rule changes long-standing agency practice or alters something from the past. So has the status quo now deviated one way or another.

Looking at that, some cases I'll cite into the record here that I believe--on this point that I don't believe are in our briefing, so I will cite them into the record: Phillips Petroleum against Johnson--these are all Fifth Circuit cases, Your Honor--22 F.3d 616; Davidson against Glickman, G-l-i-c-k-m-a-n, 169 F.3d 996; and Shell Offshore against Babbitt, B-a-b-b-i-t-t, 238 F.3d 622.

Texas's contention, Your Honor, is that the rule at issue takes a quantum leap in going from the previous policy statements and rulings of EEOC into now declaring categorical bans per se unlawful. This is a step up in the substantive proclamations of EEOC. EEOC says at the beginning of the rule that they are looking to consolidate and update what they have previously done.

It's interesting, Your Honor, that the rule comes in 2012 after the 2007 Third Circuit case, the SEPTA, S-E-P-T-A, case that's discussed in both of our briefing. And this is significant, Your Honor, in my opinion, in this regard:

The Third Circuit in the SEPTA case, contrary to briefing by the government, I don't think is helpful to the government. I think this is a helpful case to Texas, because the Third Circuit rejected the three-prong individualized assessment test that EEOC requires in the rule. The SEPTA case took a circumstance-- Well, first of all, now, SEPTA is a governmental agency. So you have a governmental agency that has the public safety and interest concerns that Texas is articulating, you have a driver or a bus operator who is responsible for the safety of the general public, and you have somebody who had been doing this job for a long time but, nonetheless, had a 40-year-old felony conviction.

And the Third Circuit ended up concluding that the government's concern about the risk of having a 40-year-old felon in that bus seat was enough to justify not--by--having a felon categorical exclusion in that case. That case is 2007. The rule comes out in 2012. And I think the rule is a repudiation of the Third Circuit's decision, because the Third Circuit now disagrees with the Eighth Circuit, which EEOC has been riding on for a long time. The Green against MOPAC case from 1975 has been EEOC's guiding star and the source of its three-pronged analysis.

And now the Third Circuit not only repudiates the three-pronged analysis but refused to engage the question that the complainant asked it to do, which was to declare that

categorical hiring bans are per se unlawful. The Third Circuit acknowledged that it was asked to do that and said, we're not going to do that; we don't have to in this case.

So it didn't go as far as we're asking you to go in this--in that particular case, but I think the timing is significant. So how does this matter? It matters that the EEOC--this rule represents not just a consolidation of everything the EEOC has previously said, but a new direction. We are amping up the game, says EEOC. We are now going to put a target on categorical bans, and we're doing this in the wake of the Third Circuit decision, which EEOC tries to spin in the rule as somehow helpful to its ends. But we certainly don't see it that way.

And lastly, Your Honor, the third question is whether a rule or a guidance is, in fact, legislative and must go through notice and comment, is whether it binds the agency or the regulated entities. And as the Fifth Circuit has made clear, the guidance, at a minimum, binds EEOC employees and investigators and what they're doing. That's not really in dispute. And, like other guidances, statements, policy memos, or memoranda that have been declared legislative rules notwithstanding their title, if you look at the guidance at issue, it uses all those key words: must, require, directs. In the language of the DC Circuit, whether--you have to ask whether it commands, requires, orders, or dictates. And the

language of this guidance, we believe, clearly does.

This guidance is the product of the five EEOC commissioners themselves, and it states, quote, "The Commission intends this document for use by EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions," unquote. And, of course, this guidance is titled An Enforcement Guidance for use in enforcing EEOC's view of Title VII.

So this rule needed to go through notice and comment, because it is legislative in character. And then the query before the Court, Your Honor, in that instance would be, does it fall within EEOC's rulemaking authority? Is it a suitable procedural regulation to use the language from Title VII cabining what EEOC's rulemaking authority is?

So once you determine it had to go through notice and comment, which we believe it did, the Court then asks whether it is a suitable procedural regulation, and we believe obviously this rule is not merely procedural and doesn't satisfy the substance of that test.

Why is that? Why is it not procedural? I think that there are a couple of indicators I will highlight that I've already mentioned in some--but just to demonstrate in this particular part of the argument why it's not procedural. It is devoid of the substantive analysis that a sovereign like Texas requires, or special solicitude. It provides all kinds of

substantive examples; says it applies to us but never once uses an example that's emblematic of the concerns of a governmental entity like Texas.

Of course, it's substantive because it represents the slow--the culmination of the slow snowball approach that the EEOC has taken to raising its individualized assessment standard and, at the same time, lowering the business necessity query that is so central to the analysis.

The rule does not acknowledge and, in fact, we think substantively says the contrary, that it may be permissible for an employer to maintain a no-risk policy with regard to felons, as Texas clearly does in multiple, eminently reasonable circumstances.

Looking more generally, Your Honor, at, as I start to turn the corner and near the end of my initial presentation here, some of the substantive problems--I want to highlight some of the substantive problems that Texas has with the rule in general, which would provide the basis for the Court to do what we're asking it to do, to declare that the rule is not just an unlawful exercise of EEOC's rulemaking power, but also that it is substantively inept for the conflicts that it has and the legal consequences that it imposes.

The three-part test, Your Honor, that EEOC extolls in this rule as the North Star of analysis came from the February 4, 1987, policy statement. We talk about this on

pages 37 and 38 of our opening brief, Docket Number 95. There is no mention of the Griggs Supreme Court standard that business necessity is the touchstone in this document. This is significant, Your Honor, because even though the Supreme Court has said that business necessity is the touchstone, now the three-part test, unveiled for the first time in 1987, has no mention of Griggs whatsoever. The individualized assessment is born; business necessity is now put in the back seat. And from this point forward, EEOC makes no quarter whatsoever in any of its releases, statements, policy memoranda, for no-risk policies like those that Texas has.

The SEPTA case, as I alluded to a moment ago, Your Honor, shows that categorical bans are appropriate and should survive judicial scrutiny. There, you had a governmental body, SEPTA--it was a deliberative body, so it's not just run by a single head, but it has commissioners or trustees--I forget what their formal title is--and we believe that their pronouncement as a governmental body is entitled to the presumption of validity. The Third Circuit certainly extended, at some level-- It didn't extend--I don't want to misstate the case, Your Honor. It didn't say that the SEPTA rule was entitled to a presumption of validity, because it was enacted by a deliberative body.

But that's one of the requests that we're making of this Court is that--to acknowledge that when a deliberative

body issues something, the presumption of validity is attached to that and should fill the Title VII analysis, then placing the burden on the challenger to demonstrate, under the Title VII language, that there was an alternative employment practice.

The reason we win--one of the reasons we win on the merits, Your Honor, here, we believe, is because-- You can look at this from two avenues. The first avenue is the presumptive avenue for which we're advocating, is that because Texas law came from a deliberative body, the legislature, and is presumptively valid, we have now satisfied the Title VII test, notwithstanding any disparate impact.

Under the statute, the challenger must now demonstrate that there is an alternative employment practice available. Our opponents in this case have brought forth no evidence whatsoever, no argument, put nothing in the record that there is a suitable alternative employment practice that satisfies Title VII regarding any of our categorical bans, much less the ones that we have specifically highlighted in our briefing and in the evidence that we have put before the Court. So I think simply based on the absence of evidence, the Court can find for Texas in that regard.

But even if you don't, Your Honor, extend to Texas the legislative presumption that we're asking for, we have put forth evidence in this case demonstrating that the categorical

bans are job-related for the position in question and consistent with business necessity or public interest. And in the face of that evidence, there has been no argument, push-back, evidence to the contrary that an alternative employment practice exists.

So let's get specific. In our opening brief, Docket Number 95, at pages 18 and 19, we discuss the evidence put forth by the Department of Public Safety regarding the--meeting the--what we believe meets the Title VII standard, and that specifically includes the declaration of Kathleen Murphy, which is in the appendix at pages 60 through 62, and the many related attachments to that declaration.

Your Honor, that is evidence that is before the Court filling up the Title VII box, if you will, from the employer's standpoint, and there is no rebuttal. So we should--we win in that regard because of the absence of evidence on the other side.

And to be fair, Your Honor, we think that these categorical bars are unassailable, that there really isn't any evidence that could be forthcoming from our opponent that could show an alternate employment practice with regard to these things.

Pages 19 and 20 of Docket Number 95, the Department of Aging and Disability Services demonstrating the business necessity and why the categorical bar is important to the

workings of that agency. And I could go on from pages 20 through 23. We put forth evidence and argument regarding the Texas Lottery Commission, the Texas Juvenile Justice Department, the Texas Parks & Wildlife Department, the Texas General Land Office, and the Texas Secretary of State. You have evidence and argument before you, Your Honor, on those things at a minimum that demonstrate that we satisfy any Title VII query and that, therefore, Texas's categorical hiring bars are not presumptively invalid under Title VII.

We ask the Court for a declaratory judgment. And as we articulate in our second amended complaint--this is on pages 16 and 17 of that, which is Docket Number 62--we're asking the Court to declare that the Texas laws and policies that categorically bar felons from certain positions of employment, or certain kinds of felons from certain positions of employment, are presumed lawful under Title VII.

Secondly, we're asking the Court to declare that Title VII does not, contrary to the rule, outright prohibit categorical hiring bars. What this means, Your Honor, is, as a corollary, individualized assessments are not always required, because the rule says the same thing in two different ways. In some breaths, it takes a stab at categorical hiring bars. In other breaths, it extolls the necessity of individualized assessments. Either way, I think the rule is saying the same thing; it's just saying it in a different way, that you must

always do individualized assessments and you can never have a categorical hiring bar.

And so if the Court were to find for Texas on the merits, we would ask that the declaration cover both of those bases, not just preserving the right of Texas to maintain the bars, but the fact that the right to preserve those bars means that we don't have to conduct individualized assessments.

And the DPS example that the Court has before it is a good one. We received the gentleman's application. We put it through the regular process for which we put all applications. We let the gentleman know that, because he's a felon, he doesn't qualify, thank you very much, and that was the end of it. We preserved our bar, did not conduct an individualized assessment. Both of those things were valid.

The third thing, Your Honor, in the context of a declaration, is that--and this piggybacks on the first two things--is that necessarily, then, the safe harbors that the rule articulates, the Fifth Circuit talks about these, and these exist on page 2 of the rule, which is page 5 of our appendix, that the safe harbors are improper, incomplete, or nonexhaustive.

Your Honor, you can also mention in that regard the deference question in terms of what deference is or is not owed to the Equal Employment Opportunity Commission. The Department of Justice is correct that the Supreme Court has acknowledged

interpretive rules from the EEOC and extended to them Skidmore deference, which I think functionally is really no deference at all. Skidmore deference is, we'll give you deference if it's right and makes sense, depending on how well you research it, you know, how sound are your conclusions.

I think a declaration in Texas's favor would be, at some level, incomplete if it did not include a reference to the deference that is owed to this particular guidance, or the absence of deference that is owed to the particular guidance, because in the wake of the declaration that we are asking the Court to make, the question still remains, well, what does the guidance mean then? What do we do with it? How do we--how do we use it?

And so the fact that the Court owes what we believe is no deference to the document, because it did not go through notice and comment therefore is unlawful, I think would be important. At a minimum, the Court could extend Skidmore deference and then get into the analysis of why the guidance is wrong. I don't think you have to do that, Your Honor, given the absence of evidentiary retort from the defendants, given what we put forth. But if you wanted to go there, Your Honor, you certainly could. I think we have articulated why the legal foundations of this guidance document are shaky and not on a firm foundation and, therefore, you know, set up an appropriate Skidmore analysis.

But I think the Court could also say no deference is owed to this document because it is legislative in nature, it did not go through notice and comment, and, therefore, it is unlawful as a matter of law and do away with the whole thing. And I think that's implicit in our remedial request, and we are asking the Court to do that.

THE COURT: You have about ten minutes.

MR. NIMOCKS: Your Honor, I will, please the Court, save that for any rebuttal I may have.

THE COURT: All right, sir.

MR. NIMOCKS: Thank you very much, Judge.

THE COURT: All right.

MR. POWERS: Good morning, Your Honor.

THE COURT: Good morning.

MR. POWERS: Again, Jim Powers on behalf of the United States.

In one respect, Your Honor, this suit concerns a 2012 EEOC enforcement guidance concerning the Title VII implications of the use of criminal background information in employment decision-making. Texas here challenges that guidance under the Administrative Procedure Act in Count II of its complaint, and for the reasons that we've laid out in our briefing and which I'll discuss again today here, Texas lacks standing to pursue that challenge, and its challenge lacks merit under the Administrative Procedure Act and under

Title VII.

But Texas here in this lawsuit goes a substantial step further than simply challenging the 2012 guidance. Because Texas here, in Count I, asks the Court to bless, under Title VII, all of its various felony conviction and related employment practices. It asks the Court to do so upon a minimal factual record without an immediate concrete dispute among the parties and with respect to employment practices that do not even exist yet because the legislature hasn't yet enacted them.

In both counts as well, Texas here challenges a view of Title VII that the EEOC has held for at least 30 years, going back to the Reagan Administration and even longer. In all that time, Texas has coexisted with the government's view of these issues and has not suffered injury.

In short, the State's claims lack merit, and the Court is without jurisdiction to consider them, and we respectfully urge the Court to grant summary judgment for the defendants.

And I want to begin by responding to a few handful of the issues raised by Texas that also are present in its briefing and which we believe bear clearing up and which demonstrate the lack of merit to Texas's claims.

The first is that Texas's claims are based on a series of misimpressions and misstatements about what the

EEOC's 2012 enforcement guidance says and does. First and maybe most pivotally, the guidance does not require the use of individualized assessments. It says it repeatedly that employers, under Title VII, need not employ the mechanism of individualized assessments in using criminal background information in employment decision-making. It certainly recommends it as a best practice, but that's far from saying that the guidance requires that.

The guidance also does not take a categorical position on Texas's practices as they have been alleged and put before the Court. The guidance simply provides a framework for understanding when the business necessity defense may or may not be met, a framework for regulated parties and for EEOC staff to understand the Commission's views on that question. But it does not take a categorical position on the kinds of what appear to be targeted screens that Texas has here.

Texas has put forward evidence of a series of different agencies which have different hiring practices. Some forbid all felons from all jobs but not certain misdemeanors, some categories of felons for certain jobs, some for certain periods of time. The guidance contemplates that an employer may or may not meet the business necessity defense when it employs that kind of targeted screening.

And I think that it's important to note, at one point during its argument, Texas says that the guidance doesn't

include any examples that go towards the kinds of concerns that Texas has, namely with respect to, for example, peace officers and schoolteachers.

Now, first, I want to note that the guidance doesn't take any categorical position on the Title VII validity of--or invalidity of employment restrictions with respect to those particular positions. It doesn't take a categorical position on any particular kind of screen like that.

But the guidance actually states--and I want to point the Court to page 24 of the guidance. In Example 11, it discusses a state law exclusion which--for a particular hypothetical state that imposes criminal record restrictions on school employees and an applicant for a position as an office assistant at a preschool, and the applicant was going to be in a position where he would be dealing with children.

The applicant was forbidden--or was not--did not obtain employment with the school, and he filed a charge of discrimination in the hypothetical. But the EEOC recommends or, in the hypothetical, determines that there is no disparate impact or business necessity demonstration--or I should say there is a business necessity demonstration, because the restriction at issue addresses serious safety concerns in a position involving regular contact with children.

So the EEOC's guidance, while not taking a categorical position either way on the kinds of restrictions at

issue in this case, certainly acknowledges that these kinds of safety concerns would have an important bearing on the analysis of any particular employment restriction.

I also want to note another misperception about the guidance, which is that the guidance does not, of its own force, preempt any state law, and that that certainly doesn't preempt Texas law. The guidance does state at one point what is true of Title VII, which is that Title VII does directly--when a state law directly conflicts with federal law, then Title VII would preempt that law. But that's not something the EEOC came up with. That's simply the operation of Title VII and the Constitution Supremacy clause.

Moreover, of course, the guidance does not firmly and conclusively state that any particular practice would be a violation of Title VII.

A second essential issue with Texas's claims which Texas relies principally on in its arguments is that they seek to relitigate a question here before the Court that was settled by the Supreme Court 40 years ago, and that question is whether or not Title VII applies to states in their capacity as employers just as it does to private employers.

In the Dothard vs. Rawlinson case, the Court heard argument from the State of Alabama that employment restrictions enacted pursuant to Alabama statute were entitled to special treatment, special solicitude because of the fact that they

were the product of a state legislative process and that Title VII should not treat those kinds of restrictions just as they would a private employer's employment restrictions.

And the Court, in summary fashion in a footnote, rejected that argument. It said that Title VII was intended to apply to state and private employers alike. And, therefore, Texas's arguments here with respect to the various statutorily enacted hiring bars is simply foreclosed by the Dothard case from the Supreme Court.

A third essential problem that I'd like to note here is that Texas's claims here are fundamentally based on a series of disagreements with federal statutes and with Congress through its enactment of those statutes rather than with the EEOC and the EEOC's 2012 enforcement guidance. For example, Texas, I think, seems to have a disagreement simply with Title VII's permission of--and provision for disparate impact liability. They note the idea that there's going to be countless lawsuits from felons. They note that--a potential flood of litigation in their briefing.

But regardless of whether or not the guidance had or had never existed, Title VII provides that persons may seek relief pursuant to a charge of disparate impact, and so, you know, ultimately, in claiming that there's going to be this kind of flood of litigation, which I note has not actually occurred, that they're really disputing the fact that Title VII

allows people to seek relief pursuant to a claim of disparate impact. Now, the merits of any particular claim, that's something to be adjudicated by the courts. But the fact of these lawsuits, if they were to ever exist, would be something that would be pursuant to Title VII, not the EEOC or its enforcement guidance.

I think Texas also seems to dispute the nature of the business necessity defense as it's laid out by statute. The statute requires that an employer, first of all, has the burden of establishing a business necessity once a showing of disparate impact has been made. Additionally, that showing must involve a showing that the restriction at issue is job-related for the position in question, which necessarily involves a job-by-job kind of inquiry.

And the Supreme Court's case law on the business necessity defense bears that out. Business necessity measures the person in relation to the job, not the person in the abstract. So again, Texas's attempt to kind of obtain a ruling on a blanket basis that there's a notion that Texas's enactments are presumed valid I think runs contrary to the statute's provision for a job-related business necessity defense.

Texas also, in referring to the idea of regulatory dark matter, seems to take quarrel with the idea of interpretive rules, statements of policy, and the fact that

these kinds of agency mechanisms can be issued without notice and comment rulemaking. But the Administrative Procedure Act provides agencies with those tools, and it provides that agencies need not engage in notice and comment rulemaking in pursuing those mechanisms.

Again, Texas doesn't have a claim here with respect to the APA, just as it doesn't with respect to Title VII. And so the fact that so many of Texas's claims rely on their disagreement with federal statutes rather than the EEOC or the Department of Justice I think shows that those claims lack merit.

Now, I'd like to--and I'll get into some of the other points that Texas has raised, but go through a little bit the various specific arguments we have made in our summary judgment briefing with respect to Counts I and II.

Count I seeks a declaration, as I've said, regarding the validity of Texas's hiring practices, and it focuses primarily on Title VII's provision for disparate impact liability. So I'll just, for background, lay that out, which is that, under Title VII, an employer may be liable if it is shown that a particular restriction or practice disproportionately screens out a protected group and the practice is not supported by business necessity and job-related for the position in question.

Now, that claim, Texas seeks to have a blessing

from the Court that all of its various restrictions on the employment of felons in--of various kinds in--various kinds of restrictions, various kinds of jobs necessarily does not give rise to disparate impact liability. That claim is unripe, and it's also meritless.

Now, with respect to the ripeness issue, Texas doesn't have a lot of arguments--or has not made many arguments, and we think, you know, the issue of ripeness is firmly presented with the Court, and it precludes the kind of relief Texas seeks in Count I. Count I is unripe because, first of all, it's not fit for review. There is no adverse parties in actual controversy to the dispute here with respect to Count I. And I think that is framed in part by noting that Count I is not really about the guidance. Count I instead is a claim with respect to Title VII, which kind of would go forward or not, regardless of the guidance and its existence.

Now, there is no adverse parties here because, first of all, the EEOC could not enforce Title VII against Texas, as both parties agree. And Texas points to the idea that, in a declaratory judgment action, you sort of flip the V and look at the underlying suit the defendant would bring against the plaintiff. Now, the EEOC couldn't bring a Title VII claim against Texas. So the Count I declaratory judgment claim against the EEOC fails on that basis alone.

Now, it's true that the Department of Justice could

enforce Title VII against Texas, and it has that authority. But there is no basis to believe that it's going to do so, that any kind of enforcement action is imminent. There hasn't been one before in this context, and so, in the absence of any showing that there is any kind of concrete immediate dispute between these parties, Count I is really unripe, as well, as to the Department of Justice.

It's unripe, as well, because there is no concrete dispute presented here. Texas doesn't purely seek any kind of just a legal ruling here. What they seek is a declaratory judgment that involves a number of predicate factual determinations. For example, in the Fifth Circuit, the business necessity defense involves questions of fact, the fact being, does the particular employment restriction bear and manifest relationship to the particular job in question and satisfying the requirements of that job, and does Texas's particular employment restriction meet that test.

And here, we've got virtually no facts about hundreds of jobs that Texas claims its various employment restrictions apply to. I mean, we certainly don't have any about jobs that would arise in the future or the employment restrictions that would arise in the future. And there is no basis in the briefing and in Texas's argument for the idea of addressing that issue on a blanket basis or sort of on a purely legal basis.

I think Texas's arguments about the presumption of validity that should apply to its statutes are foreclosed by the Dothard case and the Supreme Court's determination that Title VII applies to states and private employers alike. I also note that I believe many of the cases Texas cites on that issue regard the issue of the presumption of validity to statutes as a constitutional matter, that when evaluating the constitutionality of statutes, they are presumed valid. That's a separate issue from a presumption of validity of employment practices under Title VII, which the case law in Title VII does not support.

Now, there is also no hardship to withholding review here, which is the second and independent reason why Count I is unripe. As I said, the EEOC has held this view about Title VII and the fact that it can apply in this context going back to at least 1987, thirty years. And the Department of Justice and the EEOC in all that time have not taken any concrete legal actions against Texas.

There is also no evidence here of any costs that Texas has incurred by virtue of this view of Title VII, for example, Texas changing its laws or Texas having its laws preempted by virtue of Title VII. As I've said, there is no showing here that any of Texas's laws actually are preempted by Title VII in this context. We simply don't have a sufficient record to say that.

And so as Justice Scalia said in another Texas vs. United States case we cite in our briefing, you know, if Texas is as confident as it appears to be with regard to the Title VII validity of its employment practices, there is no hardship in awaiting its vindication in a future lawsuit, if that lawsuit were to ever arise.

Now, for similar reasons, many of the same kinds of reasons, Count I is also without merit, and so even if the Court got beyond the jurisdictional inquiry, we would respectfully request that the Court enter judgment for the defendants under Count I. Again, there is no concrete, immediate dispute between the parties, and the Declaratory Judgment Act requires the existence of some kind of a concrete immediate dispute among the parties.

And also, Texas has failed to put forward evidence that would justify and support the declaration that it seeks, and as the plaintiff, it bears the burden of establishing its entitlement to relief. Again, with respect to the business necessity and job-relatedness defense, that defense involves questions of fact, and Texas has put forward no evidence with regard to hundreds of jobs to which its employment restrictions purportedly apply.

Even with respect, for example, to the Department of Public Safety, the Department of Public Safety does not merely employ peace officers. It presumably employees

administrative assistants and clerical workers and custodians, et cetera. And Texas has not shown and presented evidence that, with respect to all of those various kinds of jobs, that Texas's employment restrictions actually do satisfy the business necessity defense and that there would be a supported factual ruling on that question.

Again, also, there is no basis in the case law to address this issue on a blanket basis, or in the statute. And there is no special analysis just because of the fact that Texas is a state and that this case involves state statutes.

And I also just note Texas raises the idea--the issue of alternative employment practices. It's true that, under Title VII, once business necessity has been established, a plaintiff could then come back and say that there is an alternative employment practice that would just as readily satisfy that business necessity without imposing a burden on a Title VII group, a disparate impact. But, of course, that involves first the threshold of, have you actually demonstrated business necessity, and we think the evidence clearly fails to do that for Texas here.

Now, setting aside Count I, which, again, is a much broader claim than Count II and which concerns much more than just the guidance but which concerns the overall Title VII validity of hundreds of employment practices, as Texas has put them before the Court, Count II simply challenges the 2012 EEOC

enforcement guidance under the Administrative Procedure Act. And I think the first step here is standing, and we believe that Texas has failed to carry its burden to establish Article III standing.

Now, it's true that Your Honor previously ruled on the standing issue at the motion-to-dismiss stage, concluding that Texas is the object of regulation and that, therefore, Texas may rely upon a presumption of injury by virtue of being the object of regulation. But that's simply a presumption, and as we move through the case, now that we're at the summary-judgment stage, Texas's burden of persuasion and production on the standing issue increases.

And the discovery we served and the responses we received and the evidence before the Court demonstrates that there is no--there is no injury here, and no cognizable Article III injury, and that, therefore, the Court would be well--would be well advised to deviate from that presumption of injury and, in fact, to find that Texas has not established it.

Again, just to kind of run through some of the points that we've discussed in our briefing, there hasn't been any government enforcement proceedings against Texas pursuant to Title VII in this context. Now, Texas points to--extensively to the charge of discrimination filed by an applicant for DPS employment in 2013. I'll note just a couple of things about that episode.

First, it was not a government-initiated action. It was not an enforcement proceeding in the sense that it did not involve a lawsuit filed by the government. What it involved was a private individual filing a charge of discrimination and then the EEOC investigating that charge, which it is statutorily obligated to do. It's not a product of the guidance. That's a product of Title VII. And then subsequently, the EEOC was unable to establish a violation of Title VII, and the EEOC issued a right-to-sue letter, which, again, it is statutorily obligated to do, regardless of its view of the merits of a Title VII claim.

And so, you know, Texas kind of attempts to say that it has incurred costs here by virtue of that charge of discrimination, but there is no evidence before the Court indicating that this person was inspired or--or what motivated his charge of discrimination, the fact that it--was it the result of the guidance or simply his views of Title VII and his relationship to it. And there is no evidence that there has actually been any government enforcement proceedings against the EEOC, which I think shows the lack of injury there.

There has also been no showing that Texas agencies have changed their policies as a result of the guidance or the government's views of these issues. Texas isn't aware of any, as it stated in discovery. It's also unaware of any agencies or Texas entities violating Texas law in order to comply with

their understanding of Title VII.

And one other point that I want to raise is the idea of a forced choice, a Hobson's choice. This is raised in part by Texas's discussion of the Texas vs. United States case, the DAPA case from a couple of years ago. Now, there is no forced choice shown here because there is simply no basis under the guidance to say firmly or with anything more than speculation that any one of Texas's laws or policies actually violates Title VII.

What we can say is that the DAPA case involved a situation where Texas was, by undisputed evidence, facing substantial financial costs if it did not change its laws. And so there really was a forced choice, where Texas either was going to incur substantial financial costs or it was going to have to change its law. And in that situation, the Court concluded that there was a kind of forced choice, that there was a cognizable injury related to the State's sovereignty.

Here, there is no showing of that kind of violation that's certainly in the offing. As I've said and as we have sort of stressed repeatedly, the guidance does not conclusively state that Texas's practices do violate federal law. They may or they may not, or some may or some may not. And so there's no showing here sufficient to bear the kind of forced choice inquiry that Texas brings up that Texas is actually violating federal law and that it needs to change its law or feels that

it needs to in order to comply with federal law. And, you know, that's--there's no kind of pressure, quote unquote, that Texas referred to in its oral presentation.

So we think all those--all those elements demonstrate the lack of Article III injury and the lack of jurisdiction to pursue Count II. But even if the Court were to move to the merits of Count II, we think that Count II fails under the substantive standards of the Administrative Procedure Act and Title VII.

Now, there's three kind of challenges to the guidance that are lodged in Count II, two procedural ones and one sort of substantive one. The procedural challenges basically say that the EEOC was without authority to issue the guidance and that the guidance must have been issued pursuant to notice and comment rulemaking.

Texas's challenge here, I think, rises and falls on the idea that the guidance is a legislative or substantive rule, because if the guidance was not a legislative or substantive rule, if it was, instead, an interpretive rule or a statement of policy under administrative law, then EEOC was certainly within its authority to issue it, as I think Texas seems to have acknowledged in its oral argument by noting that the Supreme Court has even accorded Skidmore deference to EEOC interpretive rules.

But it also would not have been needed--it would

not have needed to have been issued pursuant to notice and comment rulemaking in that circumstance, because the APA is clear that interpretive rules are exempt from the notice and comment rulemaking process. And, of course, courts are precluded by the APA from prescribing any different or higher procedural burdens than the APA itself prescribes.

Now, the guidance is decidedly not a legislative rule under the relevant standards. Simply put, none of the hallmarks of a legislative rule are shown here with respect to the guidance. I think most importantly, if a lawsuit were brought in this context or an enforcement proceeding were brought in this context, that suit or that enforcement would be pursuant to Title VII itself, not to the guidance. The finding of liability would be entirely supported if the guidance had never existed or if it ceased to exist. That's because the guidance does not, in fact, grant legal rights.

What the guidance does is describe the EEOC's views of this issue, and this is shown by the fact that, as we have cited in our briefing, a number of different district courts, for example, have denied motions to dismiss in disparate impact claims in this context where there was no reliance upon the guidance or the guidance was either not discussed or accorded, at most, Skidmore deference. And so the fact that--the fact that courts are able to and are enforcing Title VII in this context in the absence of the guidance, or without reliance

upon it, really shows that the guidance isn't actually a legislative rule.

Some of the other kinds of hallmarks are that, you know, the guidance was not published in the Code of Federal Regulations. EEOC didn't invoke legislative authority in promulgating it, and it doesn't change a prior legislative rule. Now, Texas points to the idea that the guidance marks a sea change or a quantum leap in the EEOC's views of this issue. We would respectfully disagree. We think that the guidance is consistent with prior policy statements and guidelines from the EEOC on this issue, and it certainly doesn't conclude that individualized assessments are required or that Texas is, in fact, violating federal law, which I think Texas points to as being the primary ways in which the guidance marks a sea change.

We think, Your Honor, instead, that the guidance is best interpreted, for purposes of this motion, as an interpretive rule. Now, I'll just kind of, I guess, highlight one point from our briefing. We are not here seeking to relitigate the question at this time that the guidance is final agency action. Your Honor has ruled that it is. The agency, I think, continues to believe and our position continues to be that it is not, and we will preserve that point as needed. But we are not relitigating that question for purposes of this motion.

Now, the agency also, I think, takes the position that the guidance is best construed, for purposes of administrative law, as a statement of policy, because it represents a statement of how the agency intends to exercise discretionary authority. But there is a lot of overlap between the final agency action inquiry and the statement of policy inquiry.

So again, we're not pressing that point here, because we take Your Honor's ruling at the prior stage of the case. Instead, we think that the guidance is also quite reasonably interpreted as an interpretive rule for administrative law purposes, and that's how we ask Your Honor to construe it for purposes of this motion.

An interpretive rule simply states what an agency understands a statute to mean in a particular context. And here, that's exactly what the agency has done. It has interpreted Title VII, applied the statute and the case law interpreting the statute to a particular type of situation, namely, the use of criminal background information in employment decision-making.

Now, it's true that the guidance provides more detail than is contained in Title VII, but the key test for an interpretive rule is whether or not, nonetheless, the guidance is fairly encompassed by Title VII. And it is. And I think the chief way we know this, again, is that, even in the absence

of the guidance and the agency's interpretation, Title VII liability in this context would be fully supported.

So the guidance hasn't created a new kind of liability or a new kind of right. It simply explained how Title VII--or how the EEOC understands Title VII in this context, and it's provided guidance and additional information to regulated parties, which, I should note, courts have stated that there is nothing sort of dark or dark matter about interpretive rules. Instead, they provide regulated parties with an understanding of how an agency understands a statute which it's tasked with enforcing, and the EEOC is certainly tasked with enforcing Title VII, particularly outside of the context of state employers.

I'd also just like to note as well that the issue of the practical effect of the rule--or of the guidance, I should say, is not the dispositive question. Interpretive rules may have practical effects on regulated parties, because regulated parties may conclude that they should--that it would be best that they change their conduct to conform to the agency's views of a question. But the issue, instead, is whether or not there is legal effect, that a new right or duty is created. And the guidance does not create any kinds of new rights or duties. Instead, it just interprets Title VII in this arena.

Texas also, I think, related to this issue, talks

about the idea of an increased field of potential plaintiffs. Again, this may go somewhat to the idea of the plaintiffs being inspired by the guidance in some way to file suit. But the guidance does not, as a legal matter, expand the field of plaintiffs that Texas could face suit from, because again, Title VII itself creates disparate impact liability, and there is no basis to say that disparate impact liability in this particular context is any different than in any other employment context.

So all that's why it's our view that the procedural challenges to the guidance fail. The guidance is properly construed, for purposes of this motion, as an interpretive rule, and so those portions of Count II fail on their merits.

Now, the guidance is also challenged as a substantive matter in Count II, but here, Texas brings a facial challenge to the guidance, and it bears a heavy burden in doing so. Count II states that the guidance on its face is an unreasonable interpretation of Title VII and is contrary to the statute. But in bringing that kind of facial challenge, Texas here bears the burden of showing that in no circumstances is the guidance actually reasonable or in keeping with the statute, and Texas fails to do so.

Now, the guidance discusses the issue of disparate treatment liability under Title VII, which Texas--is not really the focus of Texas's suit, and Texas doesn't respond to our

arguments that, with respect to disparate treatment liability, the guidance is perfectly reasonable. As Judge Higginbotham said in his since-vacated dissenting opinion, with respect to disparate treatment, the guidance simply states elementary propositions of law.

Even with respect to disparate impact, though, the guidance is reasonable, and it's in keeping with Title VII.

Now, the guidance applies simply the particular factual context discussed there to the context of the statutory language and the case law interpreting it. It does not set forth binding rules of law about individualized assessments. Instead, in its discussion of individualized assessments and the Green factors, it sets forth a framework for interpreting and understanding the business necessity defense. You know, the Supreme Court has held that that defense requires that there be some kind of connection between the particular employment restriction and the particular job at issue and a showing that there is some necessity for the restriction for that job.

By pointing to, for example, the Green factors, which are that a targeted screen should consider the nature of the job, the nature of the crime, and the amount of time since the crime's occurrence, those factors really just go to a way of analyzing the broader business necessity defense in this particular context.

And I want to go to the SEPTA case briefly in this context. I think both parties seem to believe that the SEPTA case provides support for their respective positions, and I want to point the Court to a couple of points in the SEPTA case which I think do support the guidance and demonstrate its reasonableness.

Again, SEPTA is cited extensively in our briefing, but it's 479 F.3d 232, and I want to point to a passage at page 245 of the Court's opinion. The Court stated, and I'll quote, "If a bright-line policy can distinguish between individual applicants that do and do not pose an unacceptable level of risk, then such a policy is consistent with business necessity. Whether a policy can do so is most often a question of fact that the district courts and juries must resolve in specific cases."

So I think the SEPTA case supports our position, because it demonstrates, first of all, that Title VII is applicable in this context. Disparate impact liability is applicable. Business necessity is a question of fact that must be evaluated in regard to particular jobs, and that there is no basis to evaluate that question on a blanket basis.

And later on the same page, just after this, the Court evaluated whether or not the policy at issue was consistent with business necessity, and it pointed to evidence that the defendant had put forward concerning a particular job

at issue, the nature of the job, the fact that it involved exposure to vulnerable populations, also that--evidence that violent criminals recidivate at a high rate, that it is impossible to predict with a reasonable degree of accuracy which criminals would recidivate, and so on. So there, the Court had before it an evidentiary record, a basis to say that, in fact, the employment restriction at issue did distinguish between persons who posed an acceptable level of risk and those that did not.

So there wasn't--it wasn't kind of a broad, blanket, public-policy-based rationale or a common-sense-based rationale. It involved evidence and a record demonstrating the fact that business necessity defense was met. And that's what the guidance really, I think overall, requires, is that, by discussing individualized assessments, the Green factors--the Green factors being basically targeted screens--ultimately what the EEOC is recommending is that employers consider these issues in a way that takes account of the job-relatedness and business necessity test. And I think that, in that respect, Texas has not raised a persuasive basis to challenge the substantive points that the guidance has raised.

So unless Your Honor has any questions on these issues, I'd just like to respectfully request that the Court grant summary judgment for the defendants, that the Court conclude either that this case is without jurisdiction and

dismiss accordingly or enter judgment for the defendants. Thank you.

THE COURT: All right, sir.

Yes, sir, rebuttal.

MR. NIMOCKS: Your Honor, I just have a few notes of rebuttal that I'd like to make to the argument made by my esteemed counterpart.

The position of the defendants, Your Honor, first and foremost, is that the guidance is not as absolute as Texas claims it to be. Mr. Powers just articulated that it does not require the use of individualized assessments in all cases and doesn't take a categorical position on the various categorical bans that Texas has.

Your Honor, in assessing the language of the guidance, I think the Court is required to take a pragmatic approach. And just because EEOC may put a little caveat in here or there or use a "likely" here or there does not escape-- or does not allow it to escape the impact of what the rule does. If that was the standard, Your Honor, every guidance that has a substantive impact could always avoid review under the APA because they used the right magic words to make sure it didn't sound too concrete or too absolutist. And I think practically, the impact of this guidance is absolutely clear, and the EEOC can't play fast and loose with the language.

But even if the Court has to give credence to every

"likely" and caveat that EEOC puts in that guidance, this is where Hawkes comes in and the discussion of the Frozen Foods case from the U.S. Supreme Court in 1956. So if you look at page 1815 of Hawkes, looking at this interpretive guidance from the Interstate Commerce Commission, the warning was enough. The fact that the ICC was sharing what it thought put a marker on the wall, that was enough. So under that standard, this guidance, even if it's not absolute and concrete in all of its terms, is enough to fill up the second prong of the APA analysis.

Mr. Powers just said that a job-by-job analysis is, in fact, required. And this is really the problem. In terms of interpreting what it means for something to be job-related for the position in question, that we have to do a job-by-job analysis. With respect, that is not what the language of Title VII requires. What the defendants are omitting is the idea that a categorical ban with regard to a particular employer can be job-related for every position in question with regard to that employer and consistent with business necessity. The idea that that language in Title VII requires in every instance a job-by-job analysis and makes no room for a categorical ban just doesn't fit with the actual text of Title VII. There is room in there for categorical bans, and this is one of the problems that Texas has with the guidance.

And this is exampled by the rule itself. My

esteemed opponent made reference to Example Number 11 on page 24 of the rule, which is page 27 of our appendix regarding the office assistant at a preschool example there. It would be perfectly permissible, we contend, for that school to say, not only do we not want you in close contact with the kids in this particular position; we don't want you on the school grounds, period, because that's job-related for the position in question and consistent with business necessity, because the risk factors are the same in both instances, and, therefore, we don't hire felons, period. There is room for that type of analysis under Title VII. And so the idea that Title VII demands an individualized assessment or prohibits a categorical ban just doesn't stand.

I want to address the Dothard case briefly, and I think the Dothard case is distinguishable, Your Honor. It does not foreclose what Texas is asking. That was a question of sex discrimination, and it was a question of a statute that may well have said sex discrimination in it. It was a height and weight requirement that basically, on its face, would exclude women from the particular job at issue. And that statute only went to an employment question. That statute-- Height and weight restrictions have no provenance in Alabama law beyond the question the Court took.

Felony restrictions, Your Honor, this is something that dates back to the inception of the Republic. This is a

far different animal that we're talking about. And so the idea that the Supreme Court grabbed the statute by both hands in Dothard doesn't foreclose the idea that we're asking the Court to say, is that these felony restrictions are presumptively valid under Title VII because of the deliberative process they go through.

So it's not--it's not an isolated statute that, on its face, you can recognize categorically excludes women. That's not what we're dealing with here. We're dealing with deeply embedded systematic patchwork of Texas laws impacting over 300 places.

And I probably just have a couple more minutes, and let me-- Two last points, Your Honor.

The declaratory judgment cause of action is appropriate to EEOC. Even though EEOC can't sue us--and I acknowledge that--EEOC is the key-holder to individual and private lawsuits. They pull the lever. An individual cannot sue Texas under Title VII unless they get that ever-valid and sacred right-to-sue letter from EEOC. EEOC is the gatekeeper on that. So because they are as it pertains to the private lawsuits, which are as equal threat to Texas as is a lawsuit from the Department of Justice, we think that they are an appropriate defendant in a flip-the-V declaratory judgment analysis.

And from a remedial standpoint, I want to be very

clear, Your Honor, that we are not asking the Court to blanket declare that every categorical hiring ban that Texas has survives and is per se lawful under Title VII. That's not the request. What the request is, is that we are asking you to issue a declaration that our categorical hiring bans are presumed lawful. So there is room when we establish a presumption for this factual dispute that my opponents are demanding happen to still happen in the wake of a presumption.

Or, if the Court is unwilling to declare the presumption that we're asking, you can declare that categorical bans are not presumptively unlawful, as the guidance says that they are, because there is room in the Title VII language for a categorical ban. There is room, as the SEPTA case demonstrates, for a categorical ban. There is room to say that an employer has an absolute concrete right that's job-related and consistent with business necessity to not hire felons for a particular type of job, or all jobs, as the Department of Public Safety has done given the--like a weapons around the office, all kinds of--any number of reasons that the Department of Public Safety can come up with that I think are self-evident as to why you don't have felons running around DPS in an employment capacity.

So with that, Your Honor, those are my points of rebuttal. I thank the Court's time and attention--the Court for its time and attention today.

THE COURT: All right. Thank you.

By 9:00 a.m. on October the 25th, the parties need to file their proposed findings and conclusions. That will give you about a week.

Thank you for your presentations. Court will stand adjourned.

(END OF HEARING)

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I, Mechelle Daniel, Federal Official Court Reporter in and for the United States District Court for the Northern District of Texas, do hereby certify pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

s/ *Mechelle Daniel* **DATE** OCTOBER 20, 2017

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